85-1954

Supreme Court, U.S.
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NO.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

ALFREDO R. ARRIOLA, MIGUEL V. RAMIREZ, JR., RICARDO TREVINO, JR.,

Petitioners

V.

T. L. HARVILLE, LUCILLA DE LEON, C. W. "DINKY" PRICE, J. B. FREILEY, W. M. LAUGHLIN, ARNOLDO GONZALEZ, CHARLES HARLESS, ZARAGOSA GARCIA, JR., J. W. SUTHERLAND, JIM WELLS COUNTY, TEXAS,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

Whether plaintiff minority voters who successfully prosecute an action under Section 5 of the Voting Rights Act are entitled to attorney's fees for services rendered in an ancillary preclearance proceeding through which the minority voters obtain their litigation objective of the enactment of a non-discriminatory redistricting plan.

LIST OF ALL PARTIES IN LOWER COURT PROCEEDINGS

The following is a list of all the parties to the proceedings in the Court whose judgment is sought to be reviewed.

1. Alfredo R. Arriola, Miguel V. Ramirez, Jr. and Ricardo Trevino, Jr., Plaintiffs and Petitioners herein.
2. T.L. Harville, Lucilla De Leon, C.W. "Dinky" Price, J.B. Freiley, W.M. Laughlin, members of the Jim Wells County Commissioners' Court, Defendants and Respondents, herein.

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ALFREDO R. ARRIOLA, MIGUEL V. RAMIREZ, JR.

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Petitioners,

v.

T.L. HARVILLE, LUCILLA DE LEON, C.W.

"DINKY" PRICE, J.B. FREILEY,

AND W.M. LAUGHLIN,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO

THE UNITED STATES SUPREME COURT OF

APPEALS FOR THE FIFTH CIRCUIT

The petitioners Alfredo R. Arriola, Miguel V. Ramirez, Jr., and Ricardo Trevino, Jr., respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on January 31, 1986.

OPINION BELOW

The opinion of the Court of Appeals is reported, Alfredo R. Arriola, et al. v. T.L. Harville, 781 F.2d 506 (5th Cir. 1986), and appears in Petitioners' Appendices (Pet.App. at 1a). The opinion by the District Court for the Southern District of Texas rendered on April 19, 1984, is not reported and appears in the Appendices (Pet.App. at 38a).

JURISDICTION

The judgment of the Court of Appeals

for the Fifth Circuit was entered on January 31, 1986. A timely petition for rehearing en banc was denied on February 27, 1986, (Pet.App. at 54a) and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254 (1). The District Court's jurisdiction was invoked pursuant to the Declaratory Judgment Act, 28 U.S.C. Sec. 2201, and the Voting Rights Act, 42 U.S.C. Sec. 1973 c.

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Code, Title 42, Section 1973 c: The statute is reproduced in the Appendices (Pet.App. at 62a).

United States Code, Title 42, Section 1973 l (e): The statute is reproduced in the Appendices (Pet.App. at 67a).

United States Code, Title 42, Section

1988: The statute is reproduced in the Appendices (Pet.App. at 68a).

Fourteenth and Fifteenth Amendments to the United States Constitution: The Amendments are reproduced in the Appendices (Pet.App. at 60a and 61a).

STATEMENT OF THE CASE

Petitioners are Mexican American residents of Jim Wells County, Texas. Plaintiffs, and Petitioners herein, filed this action to enforce Section 5 of the Voting Rights Act, 42 U.S.C. Sec. 1973 c. This action successfully prevented the continued implementation of a 1975 districting plan for the Jim Wells County Commissioners' Precincts. The 1975 districting plan discriminated against the Mexican American community in Jim Wells County by fragmenting its voting strength. Through that action, Petitioners, ultimately, succeeded in replacing a

discriminatory districting plan for the Jim Wells County Commissioners' Court. The new districting plan provides a meaningful opportunity for the Mexican American community to elect candidates of their choice.

1. Background of Petitioners' Section 5 Action.

Jim Wells County is governed by a Commissioners' Court. Each of the four Commissioners is elected from one of the four Commissioner's Precincts. According to the 1980 federal census, Jim Wells county has a population of 36,498 of whom 24,519 or 67.18% are Mexican Americans. Prior to the action below, there had never been more than one Mexican American County Commissioner out of the total of four County Commissioners.

Section 5 requires a covered

jurisdiction, such as Jim Wells County, to submit any changes affecting the right to vote for approval to the United States District Court for the District of Columbia or alternatively to the United States Attorney General. The covered jurisdiction must demonstrate that a proposed change in voting does not have a discriminatory effect and was not adopted pursuant to a discriminatory purpose. Election changes which have not secured the requisite Section 5 approval cannot be implemented. McCain v. Lybrand, 465 U.S. 236, 244-245, 104 S.Ct. 1037, 1043-1044, 79 L.Ed.2d 271, 278-279 (1984) ("Statutory provisions constituting changes in election practices are not 'effective as laws until and unless [they are] cleared pursuant to Sec. 5.' "). In 1974, in response to other federal court litigation, Jim Wells County adopted and

submitted to the District Court a redistricting plan for Commissioner Precincts in Jim Wells County. (R. Vol. 1, p. 200)[1] Thereafter, on July 11, 1975, the County again redrew its Commissioner Precincts lines. (R. Vol. 1, p. 198) Subsequently, the 1975 plan was submitted to the Attorney General for Section 5 review.

Petitioners submitted a written comment[2] objecting to the 1975 plan. (R. Vol. 1, px. #17, p.2) Petitioners urged the Attorney General to object to the 1975 plan. Petitioners referred to the 40% population deviation, the retrogressive impact on minority voters when compared to

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[1] Citations in this form are to pages of the Record on Appeal.

[2] According to 28 C.F.R. Sec. 51.27, (Pet.App. 70a) individuals or groups can forward written comments to the Attorney General providing information concerning the change affecting voting.

the previous plan, the over-concentration of Mexican American voters into one precinct, and the availability of alternative plans which did not dilute the minority voting strength. (R.Vol. 1, px #17) The Attorney General issued a letter of objection[3] approximately two weeks after receipt of Petitioners' comment based upon three of the four factors listed in Petitioners' written comments. (R. Vol. 1, px # 18)

2. Petitioners' Section 5 Action.

The County continued to use the 1975 districting plan in elections for County

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3 According to 28 C.F.R. Sec. 51.39 (d), (Pet.App. at 71a) the Attorney General can object to a proposed voting change if the submitted change does not meet the Section 5 burden. The Attorney General meets this regulatory requirement by issuing a letter of objection. Georgia v. United States, 411 U.S. 526, 529-530, 93 S.Ct. 1702, 1705, 36 L.Ed.2d 472, 478 (1973).

Commissioners, despite the letter of objection. To protect their rights, Petitioners instituted this suit to enforce Section 5 of the Voting Rights Act. The complaint sought an injunction against the 1975 districting plan. In addition, Petitioners sought the adoption and implementation of a districting plan in compliance with the Fourteenth Amendment to the United States Constitution and the Voting Rights Act. (R. Vol. 1, pp. 272-73, R. Vol. 2, p.17) The ultimate objective of the action was the adoption of a districting plan which would have three Commissioners' Precincts each with a 65% Mexican American population. (R. Vol. 2, pp. 12, 75)

Since the 1975 districting plan had not secured the requisite Section 5 approval, a statutorily convened three judge Court on October 15, 1979, issued an

injunction barring continued implementation of the plan. (R. Vol. 1, p. 197) The Order also enjoined the use of the pre-existing 1974 plan until that plan, a court-approved plan, was also submitted for Section 5 preclearance. See, McDaniel v. Sanchez, 452 U.S. 130, 101 S.Ct. 2224, 68 L.Ed.2d 724 (1981). The 1974 pre-existing plan replaced an earlier plan which had also been held unconstitutional by a prior federal court decision. With the issuance of the October 15, 1979, Order, therefore, the County of Jim Wells could not conduct any elections for County Commissioners since there was no valid districting plan. The case remained pending before the District Court, but no further substantive proceedings on the merits occurred after Petitioners obtained the injunction.

3. Rejection of the 1979 and

1980 Proposed Redistricting Plans by the Attorney General.

After the issuance of the injunction, the county submitted two redistricting plans (1979 and 1980 plans) to the United States Attorney General for Section 5 approval. The county's first two plans did not include three Commissioners' Precincts each with a 65% minority population. Petitioner opposed these plans and urged rejection of these plans as racially gerrymandered. (Transcript of Proceedings Jan. 5, 1983, pp. 22-24)

During this administrative process, Petitioners submitted written comments and forwarded alternative plans to the Attorney General. The alternative plans created three County Commissioners' Precincts each containing a 65% minority population. As noted by the Court of

Appeals, the Petitioners' involvement in this ancillary administrative proceeding was significant: "In addition to submitting proposed plans, MALDEF undertook other activities in connection with the preclearance process, primarily lobbying with county and federal officials." (Pet.App. at 4a - 5a)

The Attorney General disapproved these two redistricting plans. (Transcript of Proceedings Jan. 5, 1983, pp. 61-62) In the letters of objection, the Attorney General cited the same reasons urged in the comments submitted to the Department of Justice by the Petitioners.[4]

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4 The letter of objection for the 1979 plan listed as reasons, the discrepancies in the data provided by the County, the presence of racially polarized voting, the distribution of the Mexican American population among all four precincts, and the lack of participation from the Mexican American population,

During the development of the 1979 and 1980 plans, Petitioners presented alternative plans to the County and urged the creation of a plan that contained three 65% Mexican American commissioner precincts. (R. Vol. 1, px #5 entries 11-6-79 through 11-26-79; id. px# No. 8 and px# No. 12 entries 10-26-79 through 1-16-80; and id. px# No. 13) In some

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especially the only current Mexican American Commissioner. (R. Vol. 1, px # 22) Three of those reasons were based upon Petitioners' comment. (R. Vol. 1, px # 21) Testimony at the fee hearing reveals that the M.A.L.D.E.F. paralegal, Dianne Ross, actually called the problem, concerning the discrepancy in data submitted by the County, to the attention of the Department of Justice analyst. (R. Vol. 2, p. 108-109)

The letter of objection for the 1980 plan listed as reasons, the division of the Mexican American community of South Alice into four Precincts, the availability of alternative plans which did not fragment the Mexican American community, and the absence of community input into the redistricting process. (R. Vol. 1, px # 24) The letter of objection relied upon the same reasons urged by Petitioners' comment. (R. Vol.1, px # 23)

instances, Respondents requested the staff of Petitioners' attorneys to develop alternatives and modifications of the plans being reviewed by them. (R. Vol. 2, pp. 111-112) Petitioners' attorneys and staff attended Commissioners Court hearings, met with individual commissioners, and secured community input for the process. (R. Vol. 1, px #12 entries from 3-21-80 to 8-12-80)

The County, being without a valid plan to conduct elections as scheduled for Commissioners, simply did not hold elections in November, 1980. (R. Vol. 2, p. 61) Once the 1980 elections had passed, all the parties waited until the publication of the 1980 census data to begin anew the redistricting process. (R.Vol. 2, p.11) Again Petitioners' representatives made extensive presentations to the County Commissioners

in an effort to convince the County to adopt a plan with three 65% Mexican American Precincts, met with individual members of the Commissioners Court, met with the County Attorney in Alice and in San Antonio, and reviewed and analyzed plans for the County and interested community members. (R. Vol. 2, p. 106; R. Vol. 1, px #1-15) Petitioners also developed a new plan using 1980 census data. (R. Vol. 2, p. 111; R. Vol. 1, px #4 entries from 6-11-81 to 8-13-81; R. Vol. 1, px #12 entries from 6-9-81 to 10-7-81)

4. <u>The 1981 Redistricting Plan.</u>

The 1981 county plan was a significant improvement over the previous plans. For the first time the County adopted a plan with three 65% Mexican

American Precincts.[5] The County's plan was similar to the plan presented by the Petitioners.[6] The Attorney General approved the 1981 plan. The 1981 plan is the County's current plan.

Once approval of the 1981 districting plan was secured, Petitioners accomplished the objective of their lawsuit: the

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[5] Although Petitioners again opposed this plan, it was primarily based on the fact that an activist Mexican American potential candidate was placed in the only non-Mexican American district. Moreover, such opposition should not foreclose a determination that plaintiffs prevailed at remedy. See, e.g., Commissioner Court of Medina County v. United States, 719 F.2d 1179, 1181 n. 3 (D.C.Cir. 1983).

[6] Petitioners' plan contained three Precincts with Mexican American populations over 65% as did the County's plan. The Petitioners plan's strongest Mexican American Precinct was approximately 80% Mexican American (Pct.4). The County's strongest Mexican American Precinct was approximately 81% (Pct.4). Moreover, the other two Mexican American Precincts are well over the 65% Mexican American population threshold in both plans. (R. Vol. 1, px # 26a & 25a)

approval and implementation of a districting plan containing three Commissioners' Precincts each having a 65% minority population.

5. Attorney's Fees Proceedings.

After the 1981 plan was approved, Petitioners filed their Motion for Attorney's Fees on May 19, 1982. (R. Vol. 1, p. 191) The motion was filed pursuant to 42 U.S.C. Sec. 1973 l (e). On April 19, 1984, the District Court issued a judgment awarding attorney's fees to Petitioners. (R. Vol. 1, p. 40) The award provided for compensation for work performed prior to the issuance of the October 15, 1979, injunction. However, the District Court denied any award for the services rendered by Petitioners' attorneys in their successful efforts in the Section 5 proceedings before the

United States Attorney General to secure disapproval of the 1979 and 1980 districting plans. (R. Vol. 1, pp. 42-43, 44-45) (Pet.App. at 35a) The amount of the rejected hours was significant. The Court rejected 58.2 hours of attorney time. In addition the Court disallowed 378.9 hours of paralegal time. (R. Vol. 1 pp. 42-45)

The Court of Appeals for the Fifth Circuit affirmed the District Court's denial of attorney's fees for services rendered during the ancillary administrative preclearance proceedings. The appellate decision held that Petitioners were not entitled to such an award because the granting of the October 15, 1979, injunction, barring the implementation of the unprecleared 1975 districting plan, in effect terminated the litigation. The Court held that since the

administrative preclearance process occurred after the termination of the litigation, Petitioners could not be deemed prevailing parties in the voting rights action merely because they participated in an administrative process which was not connected to any ongoing litigation.

REASONS FOR GRANTING THE WRIT

I. THIS CASE PRESENTS IMPORTANT QUESTIONS OF LAW CONCERNING THE PROPER INTERPRETATION OF THE VOTING RIGHTS ACT'S ATTORNEY'S FEE PROVISION CONSISTENT WITH THE CONGRESSIONAL POLICY OF ENCOURAGING PRIVATE ENFORCEMENT OF THE VOTING RIGHTS ACT

This case raises important questions of statutory construction, the proper interpretation of which is necessary to effectuate the congressional policy of

utilizing private enforcement of Section 5 of the Voting Rights Act, 42 U.S.C. Sec. 1973 c, to eradicate the vestiges of voting discrimination. Since its enactment in 1965 and through subsequent extensions and reauthorizations, Congress has declared that Section 5 is the Act's primary tool to combat voting discrimination. Congress has also mandated vigorous enforcement of Section 5 in covered jurisdictions. Those covered jurisdictions are, Congress recognized, in the areas where the worst and most intractable practices of voting discrimination have historically occurred. Realizing that the resources of the United States Attorney General are limited, Congress has expressly permitted private parties to vindicate their rights under Section 5. Moreover, through the attorney's fees statute in the Voting

Rights Act, 42 U.S.C. Sec. 1973 l (e), Congress established an additional policy of assisting private parties to retain the services of legal counsel to secure their Section 5 rights.

The purpose of Section 5 is to prevent the adoption by covered jurisdictions election structures which have a discriminatory purpose or a discriminatory effect on minority voting strength, and to require that newly-adopted election plans be non-discriminatory. See generally, Allen v. Board of Elections, 393 U.S. 544, 89 S.Ct. 817, 22 L.Ed.2d 1 (1969). In an action to enforce Section 5, the issuance of a permanent injunction enjoining the continued implementation of a discriminatory districting plan provides only a partial remedy --the prohibition of a newly-enacted discriminatory scheme. A

complete remedy -- the adoption of a non-discriminatory election plan -- is only afforded when a new redistricting plan which complies with the Fourteenth and Fifteenth Amendments to the United States Constitution and the Voting Rights Act is in place.

Federal courts in Section 5 enforcement actions, like this case, will enjoin the use of unprecleared election plans, but defer to Section 5 preclearance proceedings the task of approving a non-discriminatory plan. Securing a complete remedy will, therefore, often require voting rights litigants to participate in the Section 5 preclearance process. Section 5 requires approval of the proposed change affecting voting by either the United States District Court for the District of Columbia or the United States Attorney General. Most political

subdivisions utilize the administrative proceedings before the Attorney General. Thus, private parties in the context of an ongoing Section 5 lawsuit must ordinarily appear before the Attorney General in order to secure their complete remedy as provided by Section 5. Because of the complex and often adversarial nature of these administrative proceedings, minority voters need legal counsel to assist the Attorney General in arriving at a proper evaluation of the facts, to apply the substantive legal standards, and to prepare the written comments. Through the attorney's fees statutes, private parties are enabled to secure legal counsel to participate in these administrative proceedings during the remedy phase of a Section 5 enforcement action.

The Court of Appeals' decision denied compensation for services rendered in the

administrative proceedings before the Attorney General. By denying such fees, the Court of Appeals' decision discourages the participation of private attorneys who would otherwise undertake to represent minority voters in Voting Rights Act cases in Section 5 covered jurisdictions. Without legal counsel, such citizens cannot further the important Congressional policy of vigorously enforcing Section 5. For these reasons, the Court of Appeals' decision undermines important Congressional policies which underlie the fee provisions of the Voting Rights Act. The proper construction of that provision to comport with those policies presents an important question warranting review by this Court.

A. EXPLICIT CONGRESSIONAL POLICY FAVORS VIGOROUS PRIVATE ENFORCEMENT OF SECTION 5.

Congress has repeatedly recognized the central role of Section 5 in eliminating voting discrimination since the adoption of Voting Rights Act in 1965. As recently noted by this Court:

> "Congress has amended the Voting Rights Act several times, each time continuing the basic structure of the original preclearance provision. In the legislative history of the extensions of the Act, [Sec.]5 has been deemed to be a 'vital element' of the Act to ensure that new subterfuges will be promptly discovered and enjoined. H.Rep. No. 397, 91st Congress, 1st Session, 8 (July 28, 1969)." (footnote omitted)

McCain, supra, 465 U.S. at 248, 104 S.Ct. at 1045, 79 L.Ed.2d at 281 (1984). During its consideration of the 1982 Voting Rights Act extension, Congress acknowledged the continuing need for Section 5 coverage:

> "Although we have come a long way since 1965, the nation's task in securing voting rights is not finished. Continued progress toward equal opportunity in the electoral process will be halted if we abandon the Act's crucial safeguards now.
>
> The Committee [Senate Committee on the Judiciary] is equally concerned about the risk of losing what progress has already been won. The gains are fragile. Without the preclearance of new laws, many of the advances of the past decade could be wiped out overnight with new schemes and devices." (footnote omitted)

S.Rep. No. 97-417, 97th Cong., 2d Sess., 10 (May 25, 1986).[7]

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7 The Senate Report repeatedly documented the instances where Section 5 objections prevented the implementation of discriminatory election changes. Senate Report, supra, at 12. In the State of Texas, from the time period of 1975-1981, there were at least 85 letters of objections. Hearings on the Extension of the Voting Rights Act before the Subcommittee on Civil and Constitutional

The purpose of Section 5 is very straightforward:

> "This provision was designed to insure that the old devices for disenfranchisement would not simply be replaced by new ones. Through this remedy Congress intended to provide an expeditious and effective review to insure that devices other than those directly addressed in the Act (literacy tests and the poll tax) would not be used to thwart the will of Congress to secure the franchise for blacks."8

S.Rep. No. 97-417, supra, at 6. As

Rights of the House Committee on the Judiciary, 97th Cong., 1st. Sess., pt.2 at 960 (1981) (hereinafter cited as House Hearings). From the time period of 1965 to early 1982, there were 695 letters of objection issued by the Atttorney General to covered jurisdictions. Hearings on S. 53, S. 1761, S. 1975, S. 1992, and H.R. 3112 (Bills to Amend the Voting Rights Act of 1965) before the Subcommittee on the Constitution of the Senate Committee on the Judiciary, 97th Cong., 2d Sess., 1718 (1982) (hereinafter cited as Senate Hearings).

8 The Section 5 provision also protects language minority groups such as persons of Spanish heritage. 42 U.S.C. Sec. 1973 1 (c) (3).

indicated by the legislative history, the ultimate objective of Section 5 is to secure in place a non-discriminatory election structure, not merely to permanently enjoin a discriminatory change in the law affecting voting.

Congress and this Court also recognized that the resources of the Attorney General to enforce the Section 5 provisions were limited.[9] In view of the extensive non-compliance with Section

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9 A former Assistant Attorney General for the Civil Rights Division in testimony before House Subcommittee on Civil and Constitutional Rights to consider extension of the Voting Rights Act noted the difficulty of reviewing all of the submitted election changes. Testimony of Drew Days, House Hearings, supra, pt. 3 at 2117. See also, id., pt. 2 at 960 - 992 (testimony documented instances where private enforcement of letters of objection were necessary because the Department of Justice did not institute any litigation).

5,[10] the Attorney General needs the resources of private citizens functioning in the capacities of private Attorneys General to vigorously enforce Section 5. As this Court noted:

> "The achievement of the Act's laudable goal could be severely hampered, however, if each citizen were required to depend solely on litigation instituted at the discretion of the Attorney General. For example, the provisions of the Act extend to States and subdivisions thereof. The Attorney General has a limited staff and often might be unable to uncover quickly new regulations and enactments passed at the varying levels of state government. It is consistent with the broad purpose of the Act to

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[10] S.Rep. No. 97-417, supra, at 12-14. The Senate Judiciary Committee referred to instances where the covered jurisdiction did not submit election changes for approval and to instances where the covered jurisdiction ignored the letter of objection issued by the Attorney General, as in the present case.

> allow the individual citizen standing to insure that his city or county government complies with the [Sec.] 5 approval requirements." (footnotes omitted)

Allen, supra, 393 U.S. at 556-57, 89 S.Ct. at 827, 22 L.Ed.2d at 11-12. Thus, private enforcement plays an important role in furthering the Congressional policy of vigorously enforcing Section 5.

Congress enacted the attorney's fees provision of the Voting Rights Act, 42 U.S.C. Sec. 1973 l (e), to make it possible for private parties to retain legal counsel for proceedings to enforce voting rights. Without such counsel, private parties would not have the resources or expertise to vigorously enforce Section 5. In enacting the fee statute, Congress specifically noted: "All of these acts [including the Voting Rights Act] depend heavily upon private

enforcement, and fee awards are an essential remedy if private citizens are to have a meaningful opportunity to vindicate these important Congressional policies." S.Rep. No. 97-417, supra, at 42.[11]

B. MINORITY VOTERS' ABILITY TO SECURE A COMPLETE SECTION 5 REMEDY REQUIRES THEM TO OBTAIN REPRESENTATION IN THE SECTION 5 REVIEW PROCESS.

Contrary to the view expressed by the Court of Appeals decision, a successful voting rights lawsuit in a Section 5 covered jurisdiction does not terminate when the District Court issues a permanent

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[11] Congress' concern regarding the importance of private attorney involvement in the enforcement of the civil rights statutes resulted in the enactment of The Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C. Sec. 1988, which also provides a basis for fee awards in voting rights actions.

injunction against the challenged districting plan. The District Court continues to exercise jurisdiction to monitor the important remedy phase of the lawsuit and to assure compliance with the purpose of Section 5 - the adoption of a non-discriminatory redistricting plan. However, that remedy phase does not take place before the District Court which enjoined the prior plan.

The remedy phase is the heart of a Section 5 enforcement action. The liability phase of such a lawsuit involves very straightforward determinations of whether the political subdivision is a covered jurisdiction, whether the change in the law affecting voting must be precleared, and whether the change occurred within the applicable statutory period. City of Lockhart, 460 U.S. 125, 129, n.3, 103 S.Ct. 1000, 1001, n.3, 74

L.Ed.2d 863, 869, n. 3 (1983). During the remedy phase, the final redistricting plan will be routinely adopted by the District Court after Section 5 approval has been secured from the Attorney General. The critical substantive determinations are those made in the administrative preclearance proceedings. Therefore, to secure a complete remedy in Section 5 litigation, private parties need the services of attorneys at both the liability and remedy stages of a Section 5 enforcement action. Minority voters will need legal counsel for the administrative proceedings to assure that the final remedy complies with the applicable constitutional and Section 5 standards.

The Court of Appeals' decision, holding that the litigation terminated prior to the Section 5 proceedings and that such proceedings were wholly distinct

from Petitioners' action, severely erodes the ability of minority citizens to obtain representation in critical Section 5 preclearance proceedings. That decision mischaracterizes Section 5 litigation, misconstrues the Voting Rights Act's fee provision, and subverts the important Congressional policies summarized above.

1. Federal Courts in Section 5 Enforcement Actions Have Continuing Jurisdiction to Provide Aggrieved Minority Voters Complete Section 5 Relief.

The Supreme Court has consistently recognized the continuing jurisdiction of a District Court during the remedy phase of a voting rights lawsuit to secure compliance with Section 5. In McDaniel, supra, this Court held that whenever a

covered jurisdiction submits a redistricting plan reflecting the policy choices of the governing body to replace a districting plan found to be unconstitutional, such a new plan must be submitted for Section 5 approval. In arriving at this holding, the Court reviewed the legislative history of the Voting Rights Act which clearly referred to the continuing jurisdiction of the District Court. McDaniel, supra, 452 U.S. at 148-49, 101 S.Ct. at 2235-36, 68 L.Ed.2d at 738-739. See also, 452 U.S. at 150, note 30, 101 S.Ct. at 2236, note 30, 68 L.Ed.2d at 740, note 30 (if the legislative body fails to replace an unconstitutional redistricting plan, then the court must impose a court-ordered remedy).

The Court in McDaniel simply reaffirmed well established principles

articulated in Wise v. Lipscomb, 437 U.S. 535, 98 S.Ct. 2493, 57 L.Ed.2d 411 (1978). In Wise, the Court recognized that at the remedial stage of a redistricting lawsuit, the task of submitting a new plan must fall upon the legislative body. If the legislative body does not respond or there are other exigencies, then "... it becomes the 'unwelcome obligation,'... of the federal court to devise and impose a reapportionment plan pending later legislative action." Wise, supra, 437 U.S. at 540, 98 S.Ct. at 2497, 57 L.Ed.2d at 417. With respect to Section 5 covered jurisdictions, the Court stated:

> "Furthermore, the distinctive impact of [Sec.] 5 of the Voting Rights Act ... upon the power of the States to reapportion themselves must be observed. ... A new reapportionment plan enacted by a State, including one purportedly adopted in response to

> invalidation of the prior plan by a federal court, will not be considered 'effective as law,'... until it has been submitted and has received clearance under [Sec.] 5. Neither, in those circumstances, until clearance has been obtained, should a court address the constitutionality of the new measure. Pending such submission and clearance, if a State's electoral processes are not to be completely frustrated, federal courts will at times necessarily be drawn further into the reapportionment process and required to devise and implement their own plans."

Wise, supra, 437 U.S. at 541-42, 98 S.Ct. at 2498, 57 L.Ed.2d at 418. Accord, Connor v. Waller, 421 U.S. 656, 95 S.Ct.2003, 44 L.Ed.2d 486, 487-488 (1975); Perkins v. Matthews, 400 U.S. 379, 396-397, 91 S.Ct. 431, 441, 27 L.Ed.2d 476, 489-490 (1971). See also Berry v. Doles, 438 U.S. 190, 192-193, 98 S.Ct. 2692,

2694, 57 L.Ed.2d 693, 696 (1978).

The Court of Appeals for the Fifth Circuit has also recognized the continuing jurisdiction of the District Court in a Section 5 covered jurisdiction. In Ramos v. Koebig, 638 F.2d 838, 843-845 (5th Cir. 1981), the Court of Appeals expressly adopted this approach of deferring to the Section 5 administrative process. Accord, Trinidad v. Koebig, 638 F.2d 846, 847-48 (5th Cir. 1981); Calderon v. McGee, 589 F.2d 909, 910-911 (5th Cir. 1979).

Thus, this Court and the Fifth Circuit have both acknowledged that when, after finding a covered jurisdiction's existing plan unlawful, a District Court defers to the preclearance review of a legislatively adopted replacement plan, it is merely giving the Congressionally-preferred process an opportunity to provide the judicially required remedy.

In view of this Supreme Court and appellate precedent, the District Court has an obligation to exercise continuing jurisdiction to assure that the plan ultimately implemented provides complete Section 5 relief. Without this continuing jurisdiction, the District Court would be powerless to prevent the implementation of a new redistricting plan which was unconstitutional or in violation of Section 5. The District Court in this case did not fail to maintain its jurisdiction, but denied fees for Petitioners' litigation-related representation during the period of retained jurisdiction.

The Court of Appeals' ruling in this case that the litigation ended with the issuance of the injunction enjoining the implementation of the unprecleared 1975 redistricting plan is inconsistent with

the policy underlying the obligation to maintain continuing jurisdiction until a remedy is provided. It is also inconsistent with what happened in this case. In reality, the District Court did not terminate the litigation. The District Court did not enter any judgement until April 19, 1984. The entry of judgment came long after the eventual approval by the Attorney General of the third districting plan submitted for Section 5 review. The District Court was obliged to exercise continuing jurisdiction to assure that Jim Wells County did not conduct any elections for county commissioners using an unprecleared plan, as it had in 1976 and 1978, and did not refuse to hold any elections, as it had in 1980. As previously mentioned, the 1975 plan, the pre-existing court-ordered plan, and a prior plan had either been

declared unconstitutional or found to be in violation of the Voting Rights Act. Thus, the District Court had to exercise continuing jurisdiction to assure that the electoral process, which had been disrupted by Jim Wells County's failure and refusal to comply with Section 5, would be resumed using an election plan which did not violate the United States Constitution or the Voting Rights Act. Under these circumstances, the Court of Appeals' ruling that the litigation terminated before the remedy stage is contrary to the scheme of Section 5 enforcement as well as the reality of this case.

2. Representation in Section 5 Administrative Proceedings Is Necessary To Secure Complete Section 5 Relief.

Most of the covered jurisdictions submit their proposed changes in the law affecting voting to the Attorney General for Section 5 preclearance as an alternative to a three-judge action in the District Court for the District of Columbia.[12] Although the proceeding before the Attorney General may, as in this case, arise as a result of Section 5

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[12] In testimony before Congress during the 1982 extension of the Voting Rights Act, an official from the Attorney General's office noted:

> "As noted above, the form of preclearance used most often is submission of a proposed change to the Attorney General. The number of submissions is now huge. For example, during 1980, some 7,300 changes were submitted; more than 4,000 were from Texas. For 1981, through September 30, 5,039 changes were submitted. There has been little use of the alternative of judicial preclearance." (footnotes omitted)

Senate Hearings, supra, at 1717.

litigation, the proceeding is not a judicial one; nevertheless, the same judicial standards under Section 5 apply, as they would in a three-judge court preclearance action:

> "Indeed, irrespective of which avenue of preclearance the covered jurisdiction chooses, it has the same burden of demonstrating that the changes are not motivated by a discriminatory purpose and will not have an adverse impact on minority voters ... and federal officials are confronted with the same 'difficult substantive issue.' " (citations omitted)

McCain, supra, 465 U.S. at 247, 104 S.Ct. at 1044, 79 L.Ed.2d at 280 (1984).

In administrative preclearance actions, the Attorney General is less able to give ample consideration to possible evasions of minority voting rights. Although the same "difficult substantive

issues" are present in either type of preclearance proceeding, in an administrative submission the Attorney General does not have the benefit of an extensive discovery schedule as permitted in a judicial Section 5 preclearance proceeding. Moreover, the statute sets a limit of 60 days for the Attorney General to evaluate a completed submission of an election change. In addition, the Attorney General does not have the staff or resources to conduct an extensive review of the thousands of election changes submitted annually. For these reasons, the Attorney General relies heavily and properly upon affected private parties and their attorneys to provide information on proposed election changes in covered jurisdictions.

The involvement by private parties in Section 5 enforcement actions in the

administrative preclearance proceeding is extensive.[13] The information provided in the written comments to the Attorney

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[13] As previously stated, the forwarding of written comments is permitted by 28 C.F.R. Sec. 51.27 (a). See also, United States Commission on Civil Rights, A Citizen's Guide to Understanding the Voting Rights Act, at 8-9 (Clearinghouse Publication 84) (October 1984):

> "The final decision on a submission will be based on the requirements of the act, court decisions, and departmental policy; but evidence to support the decision will be based on information received from the submitting jurisdiction, from interested parties, and from the Department of Justice's own investigations. Detailed comments are always useful in reviewing proposed voting changes. ... If all relevant information is not available, however, individuals still should write or call the Assistant Attorney General and provide whatever information they have."

General is often the product of interviews, community meetings, and attendance at public hearings. Private parties must rely upon legal counsel to gather the facts, apply the substantive legal standards, and prepare a written comment urging disapproval of a proposed election change. In many instances the Attorney General, relies upon these written comments and other input to issue a letter of objection.[14] Where the administrative preclearance process arises out of Section 5 litigation --

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14 As noted in the testimony on the extension of the Voting Rights Act in 1981, the Attorney General would seek out individuals who could provide assistance in the Section 5 review process, "One of the things that ... [the Department of Justice] required of every submitting jurisdiction in the submission itself was information about local minority organizations or persons who would be in a position to provide us with their perspective on the proposed change." House Hearings, supra, pt. 3 at 2141.

particularly where the jurisdiction, judicially compelled to preclear a remedial election plan, elects to do so by a submission to the Attorney General -- such private parties' attorneys' involvement is an integral part of their representation of such parties in their legal action.

This case presents a good illustration of such involvement and reliance by the Attorney General on the written comments of private litigants' attorneys in issuing the letters of objections. During the administrative proceedings, the Petitioners submitted written comments by counsel urging the rejection of the 1979 and 1980 redistricting plans for the Jim Wells County Commissioners' Precincts. In the letter of objection for the 1979 plan, the Attorney General cited three of the four

reasons listed in Petitioners' written comment. In the letter of objection for the 1980 plan, the Attorney General cited all three reasons listed in Petitioners' written comment.[15]

During this administrative process, the Petitioners and their counsel engaged in very extensive negotiations with the county officials. The purpose of these negotiations was to secure a redistricting plan which had three Commissioners' Precincts each having a 65% Mexican American population. To advance this objective, Petitioners were involved in presentations before the Commissioners' Court, in discussions with individual Commissioners, and in meetings with community representatives.
Petitioners accomplished this objective

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15 See footnote 4, infra.

with the County's adoption of the 1981 redistricting plan. The accomplishment of this objective was due to the letters of objection issued by the Attorney General and the extensive negotiations undertaken by Petitioners. The adoption of the 1981 plan resulted in securing complete Section 5 relief.

Securing a complete Section 5 remedy would not have been possible without the active participation of Petitioners and their legal counsel. In attaining that remedy, Petitioners and their counsel furthered the explicit Congressional policy of vigorously enforcing Section 5 by vindicating their rights against a recalcitrant political subdivision which ignored an initial letter of objection and subsequently adopted two discriminatory redistricting plans which also resulted in two additional letters of objection.

Congress intended that in these circumstances, where the Section 5 proceeding was a necessary completion to the goal of an ongoing lawsuit, parties such as Petitioners should be awarded attorney's fees for work performed during the Section 5 administrative proceeding. The award of attorney's fees in such cases will enable minority citizens to obtain legal counsel to represent them not only during the liability stage when a discriminatory election change is permanently enjoined, but also to represent them during the administrative process which constitutes the critical remedy phase of most Section 5 enforcement actions. In order to effectuate the purposes of Section 5, the attorney's fee provision of the Voting Rights Act must be construed to permit a fee award in such cases.

3. The Court of Appeals' Decision Misconstrues the Voting Rights Act and Subverts Its Policies.

The Court of Appeals denied an award of attorney's fees for Petitioners' extensive administrative advocacy. In this case, Petitioners devoted a substantial amount of time to proceedings before the Attorney General, which constituted the remedy stage of the litigation. As previously noted, the District Court disallowed 58.2 attorney hours and 378.9 paralegal hours. (R.Vol. 1, pp. 42-45) Such a disallowance frustrates the Congressional purpose of making available legal counsel to private parties to vindicate their rights under Section 5. The disallowance of these hours from an award of attorney, fees will discourage private enforcement of Section

5. Private attorneys are well aware that these types of cases involve significant administrative advocacy before the Attorney General. Without the potential compensation for such an expenditure of time, private attorneys will simply not undertake to institute Section 5 enforcement proceedings or will not pursue them at the critical remedy phase. The ultimate result will be the absence of vigorous private enforcement actions, contrary to explicit Congressional policy.

Moreover, the denial of an award of attorney's fees for services rendered during the remedy phase of a voting rights lawsuit creates a distinction for purposes of an award of attorney's fees between those voting rights cases filed in Section 5 covered jurisdictions and those cases filed in other jurisdictions. In a jurisdiction not covered by the special

Section 5 preclearance provisions, private attorneys participate in court proceedings at the remedy stage of the lawsuit, seeking a replacement for the discriminatory election scheme. Since the services rendered in cases in such other jurisdictions are in the context of court litigation, those other litigants would be entitled to fees. However, in a Section 5 covered jurisdiction, the parties in a similar lawsuit would not be entitled to any compensation for attorney's work performed before the Attorney General in administrative proceedings mandated by the Voting Rights Act. Such a difference in treatment is not permitted by the Congressional policy of making available legal counsel to private parties to vigorously enforce the Section 5 protections. Minority citizens in covered jurisdictions were intended to have more,

not less, access to effective means of enforcing their voting rights. Yet, the Court of Appeals' decision puts minority citizens in covered jurisdictions at a disadvantage by arbitrarily concluding that the litigation terminated before the remedy stage commenced.

The Court of Appeals' decision creates another anomalous distinction between Section 5 declaratory judgment actions and administrative proceedings before the Attorney General. If the political subdivision had decided at the remedy stage of a Section 5 enforcement action to seek judicial preclearance before the United States District Court for the District of Columbia and Petitioners had secured the rejection of the 1979 and the 1980 redistricting plans by that court, there would be no question of Petitioners' entitlement to an award of

attorney's fees.[16] However, since the remedy phase consisted of administrative proceedings before the Attorney General, the Court of Appeals' decision would not permit an award of attorney's fees.

This distinction created by the Court of Appeals would permit covered jurisdictions to evade their Section 5 responsibilities. Covered jurisdictions would pursue the administrative preclearance with the full understanding that the unavailability of attorney's fees to private attorneys would leave most affected minority citizens without representation. Consequently, without the participation of the affected parties and their legal counsel, the type of vigorous enforcement envisioned by Congress in such

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[16] See, e.g., Com'rs Court of Medina Cty., Tex. v. United States, 683 F.2d 435 (D.C. Cir. 1982).

proceedings would be diminished or eliminated. The Attorney General would not have access to the type of information necessary to evaluate the proposed election change -- in particular, information from an affected party concerning the potential discriminatory effects of proposed election changes.

The chilling effect of the Court of Appeals' ruling would extend far beyond the circumstances of this case. It is typical of Section 5 enforcement actions that no additional judicial proceedings occur after the court orders legislative adoption of the redistricting plan and submission of the proposed election change for Section 5 approval. Thus, the ruling would in effect prevent the award of attorney's fees in the remedy phase of most Section 5 cases where the covered jurisdiction decides to pursue

administrative preclearance in the remedy phase of the lawsuit. Considering that there are approximately 909 political subdivisions subject to the Section 5 preclearance provisions,[17] -- many of which will have to adopt redistricting plans after the 1990 census -- the Court of Appeals' decision will have a substantial impact on the private enforcement of the Voting Rights Act.

In the case at bar, there was still no remedy after the issuance of the permanent injunction against the 1975 redistricting plan. Although there was no further judicial action, there was extensive administrative advocacy and negotiations with the County. These efforts finally resulted in a remedy meeting Section 5 standards as well as

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[17] 50 Fed.Reg. p. 19122 (May 6, 1985).

meeting the Petitioners' goal of creating three Commissioners' Precincts each containing a 65% Mexican American population. To deny an award of attorney's fees for Petitioners' work during the administrative preclearance proceedings would clearly frustrate the explicit Congressional policy of encouraging private enforcement of the Section 5 voting rights protections.

II. THE COURT OF APPEALS' DECISION IS INCONSISTENT WITH RECENT SUPREME COURT PRECEDENT

The Court of Appeals' decision is contrary to principles articulated in the recent Supreme Court decision in Webb v. Board of Education of Dyer County, ___ U.S. ___, 105 S.Ct. 1923, 85 L.Ed.2d 233 (1985), awarding attorney's fees for services rendered in an ancillary

administrative proceeding. The Court of Appeals circumvents this precedent by simply declaring that the litigation terminated prior to the remedy stage of the litigation. Such a holding is erroneous and raises an important question concerning the different treatment accorded to Section 5 administrative proceedings involving the Attorney General as compared to other administrative proceedings where attorney's fees have been awarded.

Webb involved a claim for attorney's fees for time expended on an optional administrative proceeding occurring years before litigation commenced. In affirming the denial of fees, the Supreme Court held that a prevailing party could recover fees in an ancillary administrative proceeding if the services rendered were both useful and of a type ordinarily necessary for the

successful advancement of the civil rights litigation. The Court referred to Hensley v. Eckerhart, 461 U.S. 424, 433, 103 S.Ct. 1933, 1939, 76 L.Ed.2d 40, 50 (1983), which held that compensation should be provided only for those hours which are reasonably expended on the litigation.

As observed by the Court of Appeals, the Webb holding applies to the administrative preclearance process of Section 5 (Pet.App. at 20a - 22a). However, the court below denied fees, although the Webb criteria were met here, simply because the court erroneously determined that the litigation had terminated with the issuance of the October 15, 1979, injunction against the continued implementation of the 1975 districting plan.

The Court of Appeals' holding

vitiates the principles established in Webb, by foreclosing any attempt by Petitioners to demonstrate that their administrative work was useful and of the type ordinarily necessary for the successful advancement of their civil rights litigation. Under the rule of this case below, voting rights litigants in most Section 5 enforcement actions will be precluded from advancing to the first threshold determination under Webb by the semantic expedient of declaring that in such cases there is no longer any ongoing litigation.

Moreover, according to the Court of Appeals' holding, plaintiffs would not be able to demonstrate that they were the catalysts causing the political subdivision to adopt a plan which is the product of a successful negotiation. Such a ruling is contrary to explicit Supreme

Court precedent and Congressional legislative history, recognizing that formal judicial relief is not required as a prerequisite to an award of attorneys fees. Hensley, supra, 461 U.S. at 435, 103 S.Ct. at 1940, 76 L.Ed.2d at 52.

By denying an award of attorney's fees for successful administrative advocacy before the Attorney General in a Section 5 enforcement action, the Court of Appeals decision disregards the substantive standards articulated by this Court in Webb and Hensley. Both of these cases permit the recovery of attorneys fees for hours reasonably expended on the successful outcome of the lawsuit. The fact that work may have occurred outside the confines of the courtroom is not dispositive. Webb specifically permits the recovery of fees for work expended in ancillary administrative proceedings if

the work is related to the ongoing litigation. The key inquiry is whether the ancillary administrative proceedings will dispose of issues raised by the pleadings in the complaint. In such cases, services rendered in these administrative proceedings, whether they are rendered at the liability or remedy stages of the litigation, are considered to be services reasonably expended on the litigation. One cannot simply circumvent the Webb holding by declaring that the litigation has terminated, particularly since it is only at that stage that the Voting Rights Act action commences.

CONCLUSION

For all of the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

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APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
No. 84-2421

ALFREDO R. ARRIOLA, et al.,
Plaintiffs-Appellants,

v.

T. L. HARVILLE, et al.,
Defendants-Apellees.

Appeal from the United States
District Court for the
Southern District of Texas
(Civil Action No. C-78-87)

Argued September 3, 1985

Decided January 31, 1986

Joaquin G. Avila, Judith A. Sanders-Castro, Jose Garza, Jose Roberto Juarez, Jr., Morris J. Baller, Mexican American Legal Defense and Educational Fund for Plaintiffs-Appellants.

J. G. Adami and Perkins, Oden, Warburton, McNeil and Adami, for Defendants-Appellees.

Irving Gornstein, Jessica Dunsay Silver, Civil Rights Division, Department of Justice, for United States of America, amicus.

Before GOLDBERG, JOLLY and HIGGINBOTHAM, Circuit Judges.

Opinion for the Court filed by Circuit Judge GOLDBERG.

E. GRADY JOLLY, Circuit Judge:

We hold today that attorney's fees may not be awarded to prevailing plaintiffs under the Voting Rights Act for services rendered in preclearance submissions to the Attorney General under Section 5 of the Voting Rights of 1965, as amended. [1] 42 U.S.C. §1973c. We therefore affirm the holding of the district court.

I

In 1974 Jim Wells County in south central Texas submitted a reapportionment plan for commissioner precincts to the district court, which approved the plan. The county, however, adopted a new plan in

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[1] As will be evident from our later discussion, this holding does not preclude compensation for services rendered in a preclearance submission that bear directly on the issues in an independent lawsuit and where that work is required and necessary to resolve the issues of the independent lawsuit.

1975, and the defendant Harville, a county judge, sent the Justice Department a letter informing them of the change. The Justice Department did not respond the Harville's letter. It apparently did not view the letter as an attempt to seek preclearance to the 1975 plan under the Voting Rights Act. Nevertheless, Jim Wells County conducted elections from 1975 to 1979 in accordance with the unprecleared 1975 plan.

The County did submit the plan for preclearance review in 1977. The plaintiff Arriola and others, represented by the Mexican American Legal Defense Fund (MALDEF), submitted objections to the Justice Department. In 1978 the Justice Department rejected the proposed plan.

The plaintiffs then filed an action under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c. They sought an injunction to prevent further elections under the

1975 plan and to order the county to develop a new plan. Despite the county's argument that the 1975 letter to the Justice Department was a submission to which the Department had failed to object, MALDEF succeeded in enjoining further use of the 1975 plan in October 1979. MALDEF, however, failed to prevent the 1978 elections.

Because of the injunction, Jim Wells County then submitted three plans in succession to the Justice Department for preclearance. After rejecting the first two plans, the Justice Department precleared the third. MALDEF objected to each and submitted alternative plans. In its first plan, MALDEF urged three districts, each with a Mexican-American population of sixty-five percent. It then submitted two more plans with similar Mexican-American percentages. In addition to submitting

proposed plans, MALDEF undertook other activities in connection with the pre-clearance process, primarily lobbying with county and federal officials.

The Justice Department cleared the final plan submitted by Jim Wells County. Compared to the county's first plan, this plan increased the number of commissioner precincts with Mexican-American population percentages of at least sixty-five percent from one to three. After this plan had been accepted, no further action was taken in the pending lawsuit except for matters connected to MALDEF's efforts to obtain attorney's fees and costs.

After the plan was accepted, MALDEF petitioned the district court for attorney's fees and costs. While granting fees incurred in obtaining the initial injunction, the district court denied all fees and costs for services rendered after

MALDEF obtained its injunction. In denying these fees, the district court followed the test laid out in Posada v. Lamb County, Texas, 716 F.2d 1066, 1075 (5th Cir. 1983), requiring that one claiming fees for services in the section 5 preclearance process show that his "participation, through particularly astute criticism or creative legal argument, changed the result that the Attorney General would otherwise have reached." MALDEF presented evidence to the court that compared their proposed plans and the plan finally accepted by the Justice Department, and argued that the Justice Department had apparently reacted to its objections. The Court found, however, that MALDEF had not not met the Posada standard because this evidence did not show that MALDEF had caused the Justice Department to reach a result different from one that they would otherwise have reached.

MALDEF appeals the district court's denial of fees incurred in the preclearance, the denial of all costs and the reduction of its hourly rate for travel.

II

MALDEF maintains that the district court abused its discretion when it denied fees for services rendered in the preclearance submission because the submission was part of the litigation to enforce section 5 of the Voting Rights Act. According to MALDEF, the suit for an injunction was not over because the district court retained jurisdiction and had a continuing obligation to secure compliance with the injunction. Furthermore, MALDEF argues that the objectives of the litigation had not all been achieved when the injunction was granted because the county did not yet have a plan that had at least three Mexican-American districts with population

percentages of sixty-five percent or greater. MALDEF characterizes the preclearance submission as the "remedy phase" of the injunction suit, and argues that the only effective relief Voting Rights Act plaintiffs will usually obtain comes through the preclearance submission process.

MALDEF further argues that a recent Supreme Court decision in a section 1988 case provides the standard for the award of attorney's fees for collateral administrative proceedings in Voting Rights Act cases. Webb v. Board of Education of Dyer County, __U.S.__, 105 S.Ct. 1923, 85 L.Ed. 2d 233 (1985). In Webb, the Supreme Court noted that the petitioner there had suggested "that any discrete portion of the work product from the administrative proceedings was work that was both useful and of a type ordinarily necessary to

advance the civil rights litigation to the stage it reached before settlement." Id., 105 S.Ct. at 1929. MALDEF argues that the work it did in connection with the pre-clearance submission meets this standard as both useful and necessary to advance the voting rights litigation in this case.

Jim Wells County maintains that the district court correctly applied the Posada standard that controls the award of attorney's fees in this case. The County argues that MALDEF did not show the impact on the Justice Department's decision that that standard required. The county also argues that MALDEF could not recover attorney's fees for services rendered in preclearance submissions because they were not "prevailing parties" in an "action or proceeding" as section 14 of the Voting Rights Act, the attorney's fee provision,

requires. [2]

III

Today we decide an issue left open by Posada: whether attorney's fees may be awarded under section 14 of the Voting Rights Act, 42 U.S.C. §1973l(e), for services rendered in a preclearance submission to the Attorney General under section 5 of the Act. Posada 716 F.2d at 1074. In Posada, while pretermitting the ultimate question, we said that if fees were available at all, a petitioner must show

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[2] The United States as amicus curiae joined most of the county's arguments but also emphasized the harmful effect that implementation of Posada's standard would have on Justice Department operations. The United States asked us to abandon that part of Posada that suggested a standard for recovering attorney's fees that would examine the impact of petitioners on the Justice Department's decision because petitioners might seek to require Justice Department officials to testify concerning their decisional process.

that his participation in the preclearance process changed the result that the Attorney General would have reached, and that the change was accomplished through counsel's "particularly astute criticism or creative legal argument."

To decide this issue, we must first determine whether the preclearance submission is itself an "action or proceeding." If the submission is neither, we must decide whether the services rendered in the preclearance submission were compensable as part of another proceeding, that is the lawsuit seeking the injunction under section 5 of the Voting Rights Act, 42 U.S.C. § 1973c.

IV

A.

The question whether a preclearance submission is an action or proceeding and thus whether attorney's fees can be awarded

in a section 5 preclearance submission depends on the intent of Congress when it created the preclearance submission and the attorney's fee provision.

The Voting Rights Act requires specified state and local governments to seek approval of any change from a previously approved election plan through a declaratory judgment action brought in the District of Columbia. The Act also provides a more expeditious way of obtaining federal approval of election changes: the state or local government may submit the proposed change to the Justice Department and have it precleared. If the Justice Department does not object to the change within sixty days, then the state or local government may implement the precleared change. Voting Rights Act § 5, 42 U.S.C. § 1973c. The plan to which the Justice Department fails to object may then

be implemented, and the Justice Department's decision not to object to the plan cannot be challenged in court. However, the plan itself can be challenged in a later action.

Congress also allowed successful plaintiffs in voting rights cases to recover attorney's fees. "In any action or proceeding to enforce the voting guarantees of the fourteenth or fifteenth amendment, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." 42 U.S.C. § 1973l (e) (emphasis added)

The wording of the statute requires us to determine whether a preclearance submission is an "action or proceeding." Congress' use of the term "action or proceeding" is important in discerning its intent, especially since Congress used

different terms for preclearance submissions and for actions or proceedings. For example, in the first part of section 5, 42 U.S.C. § 1973c, the terms "action" and "proceeding" are consistently used to refer to the lawsuits brought to prevent the implementation of an unconstitutional election change. In the latter part of section 5 that describes the preclearance process, the words "action" and "proceeding" do not appear, except to refer to lawsuits brought to prevent the implementation of the election change or to lawsuits brought to challenge an election change to which the Justice Department has failed to object. In other words, the drafters consistently avoided using the terms "action" or "proceeding" to describe the preclearance process. See Gerena-Valentin v. Koch, 739 F.2d 755, 760, n.2 (2d Cir. 1984)(excerpts from legislative

history of section 14).

The term that Congress employed for compensable activities, "action or proceeding," commonly refers to some sort of adversary proceeding in the nature of a traditional lawsuit. The preclearance process bears little resemblance to such an action or proceeding. There is no plaintiff nor defendant; no pleadings nor formal procedural rules; no judge nor jury; no requirement for a ruling nor judgment; no procedure to enforce or implement. Moreover, unlike the traditional lawsuit, a Justice Department decision not to object to an election change cannot be reviewed. Briscoe v. Bell, 432 U.S. 404, 97 S.Ct. 2428, 53 L.Ed. 2d 439 (1977). The Justice Department has plenary authority over the preclearance submission, and it need not consider any of the objections or comments filed by third parties such as the

appellant. The preclearance submission and decision are executive rather than judicial in nature because the Justice Department need not consider the comments of those submitting them, and can base its decision entirely on its own independent investigation if it so wishes. All these factors indicate the nonjudicial character of the preclearance process and decision. The preclearance process was developed to enable state and local governments to avoid a judical decision in an "action or proceeding," and to give them a quick decision on their election changes. Morris v. Gressette, 432 U.S. 491, 503-504, 97 S.Ct. 2411, 2419-2420, 53 L.Ed. 2d 506. (1977).

The congressional intent to award attorney's fees for proceedings in the nature of traditional lawsuits also is illustrated by the fact that Congress used

the term "prevailing parties" to describe those persons who should be awarded attorney's fees. Third parties who, like appellant, submit comments to the Justice Department are not "prevailing parties" with respect to a preclearance submission, because they are not parties at all. Section 5 of the Voting Rights Act, the provision that establishes the violations on which a claim for attorney's fees is hinged, does not even mention persons who submit comments to the Justice Department. The only rights that third parties in the preclearance process have are those afforded by Justice Department regulations under section 5. 28 C.F.R. §§ 51.27-51.30. These regulations carefully label persons providing comments on a preclearance submission as "interested individuals and groups" who submit "communications." 28 C.F.R. §51.30.

These interested individuals and groups have none of the rights of parties. They cannot start a review, they cannot compel discovery, they have no right to be present when the submitting authority meets with the Attorney General, and they cannot obtain review of the Attorney General's decision.

We therefore conclude that Congress did not intend the term "action or proceeding" to include a preclearance submission, nor did it intend the term "prevailing parties" to include interested individuals and groups who submit comments to the Justice Department in preclearance submissions.

B.

Prior interpretations of section 14 of the Voting Rights Act and related statutes support the conclusion that Congress did not intend to award attorney's fees to participants in preclearance submissions.

The Second Circuit recently denied attorney's fees under the Voting Rights Act for lobbying activities that were not closely related to a lawsuit. Gerena-Valentin v. Koch, 739 F.2d 755 (2d Cir. 1984). The Gerena-Valentin court carefully separated the claim for fees into those claimed in connection with the lawsuit and those claimed for activities solely connected to the preclearance process. The court concluded that neither the language nor the legislative history of the attorney's fee provision showed a congressional intent to award attorney's fees for activities solely connected to the preclearance process. Id. at 760-61.[3]

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[3] The appellants cite a line of cases that have awarded attorney's fees under the Voting Rights Act or section 1988 for administrative proceedings. In the light
(Footnote Continued)

The Supreme Court has recently determined that attorney's fees could not be awarded

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(Footnote Continued)
of Webb, an analogy to these cases is now fatally flawed because they rely, directly or indirectly, on Title VII, which requires that claimants exhaust available administrative proceedings before they can bring their federal suit. Stathos v. Bowden, 728 F.2d 15, 22 (1st Cir. 1984) (relying on Chapliwy and Bartholomew); Ciechon v. City of Chicago, 686 F.2d 511 (7th Cir. 1982) (relying on Carey); Chrapliwy v. Uniroyal, Inc., 670 F.2d 760 (7th Cir. 1982) (Title VII); and Bartholomew v. Watson, 665 F.2d 910 (9th Cir. 1982 relying on Carey); Brown v. Bathke, 588 F.2d 634, 638 (8th Cir. 1978)(cites Title VII cases). Many of these cases rely on Title VII indirectly through New York Gaslight Club v. Carey, 447 U.S. 54, 100 S.Ct. 2024, 64 L.Ed. 2d 723 (1980.

Webb v. Board of Education of Dyer County, which involved a claim that, like the Voting Rights Act, does not require exhaustion of administrative remedies, distinguished Title VII cases on that basis, and explicitly held that the reasoning in those cases did not apply to the context of 42 U.S.C. § 1988, and that "therefore the reasoning in Carey is not applicable to this case." Gerena-Valentin, 739 F.2d at 761. Webb, 105 S.Ct. at 1927.

under 42 U.S.C. § 1988, the wording of which is almost identical to the statute relevant here, for a state administrative process completed before litigation under the Civil Rights Act, 42 U.S.C. § 1983. Webb v. Board of Education of Dyer County, ___U.S.___, 105 S.Ct. 1923, 85 L.Ed. 2d 233 (1985). The Court said, "The time that is compensable under section 1988 is that 'reasonably expended on the litigation.'" Id., 105 S.Ct. at 1928 (quoting Hensley v. Eckerhart, 461 U. S. 424, 103 S.Ct. 1933, 76 L.Ed. 2d 40 (1983) (emphasis added in Webb).

> When the attorney's fee is allowed "as part of the costs"-to use the language of the statute-it is difficult to treat time spent used before the complaint was filed as having been "expended on the litigation" or to be fairly comprehended as "part of the cost" of the civil rights action.

Id. Since the attorney's fees provisions of

section 1988 and the Voting Rights Act are interpreted together, this reasoning should also be applied to time spent after the litigation has been completed under the Voting Rights Act. See Donnell v. United States, 682 F.2d 240, 245 n.7 (D.C. Cir. 1982); Riddell v. National Democratic Party, 624 F.2d 539, 543 (5th Cir. 1980); Connor v. Winter, 519 F.Supp. 1337, 1339 (S. D. Miss. 1981)(three-judge court).

C.

We must therefore turn to consider whether MALDEF's litigation terminated when it obtained an injunction against further use of the 1975 plan or whether the pre-clearance submission was a continuation of that litigation. There can be no question in this case that the litigation, as such, effectively terminated after the injunction. The record indicates that all docket entries in the case after the injunction

relate to the seeking of attorney's fees. Furthermore, although, as MALDEF points out, the district court retained jurisdiction that jurisdiction was to insure compliance with the injunction, not to provide any further remedy. Compare Trinidad v. Koebig, 638 F.2d 846 (5th Cir. 1981) (district court may order further relief if local government refuses to seek or cannot obtain preclearance).

MALDEF contends that the preclearance submission was the "remedy phase" of the injunction proceeding. This artfully chosen language attempts to portray an image of a plaintiff who has proved his case on the merits and who then automatically proceeds to the next step, in the same litigation involving the same parties, of proving the relief to which he is entitled. This image of the preclearance submission is hardly an accurate portrayal.

First, the preclearance submission is separate from the lawsuit. The participants are not the same. The preclearance process is in a different forum. It follows different law. In fact as we discussed above, it is not a judicial proceeding at all. There need be no connection between the lawsuit and the preclearance submission. Second, the "remedy phase" language is an inaccurate description because it suggests that the participant in a preclearance submission is a party. As we noted above, the preclearance submission is entrusted to the Attorney General, who invites comments to aid him in discharging his responsbility. Many persons submit comments who were not involved at all in lawsuits that may have preceded the preclearance submission. In the preclearance process the Attorney General accords no special privileges to

those persons who brought the lawsuit. It is therefore inaccurate to view the Justice Department's decision as the remedy phase of the separate and distinct injunction proceeding.

In this case, the litigation ended after the injunction, and therefore the services rendered in the preclearance could not have been useful or required for the litigation. Without such a connection between the preclearance submission and the lawsuit, section 14 does not allow attorney's fees.

V

The district court in this case, however, erred in its determination of the hourly rate. The district court used the hourly rate of the defense counsel as the lodestar for the fee award to the plaintiffs' counsel, but then the district court appears to have mistakenly used an hourly rate different from that charged by

the defense counsel for travel time. The court said, "plaintiff's success in this case entitles it to the hourly rate charged by one of the defendant's attorneys, Kenneth Oden, an attorney of excellent reputation who has practiced in Jim Wells County for many years, which is $70 an hour for all hours." (Emphasis added.) The result was that the "lodestar" defense counsel received $70 an hour for travel hours, and the appellants' attorney received only $20 an hour for travel hours. This was an abuse, perhaps unintentionally, of the district court's discretion. See Wheeler v. Mental Health and Retardation Authority, 752 F.2d 1063, 1073 (5th Cir. 1985); Carpenters Health and Welfare Fund v. Ken R. Ambrose, Inc., 727 F.2d 279 (3d Cir. 1983).

The district court did not abuse its discretion, however, when it denied the

plaintiff costs. MALDEF failed to submit evidence on costs at the hearing, and its tardy submission did not separate costs into those incurred before and those incurred after the injunction was granted.

The district court's judgment is affirmed as to the denial of attorney's fees for hours spent in connection with the preclearance proceeding and for all costs, and reversed as to the rate set for hours devoted to travel. The district court should allow $70 an hour for travel hours proved by plaintiffs.

AFFIRMED IN PART, REVERSED IN PART.

GOLDBERG, Circuit Judge, dissenting:

I do not read the attorney's fees provisions of the Voting Rights Act, their legislative history, or the cases interpreting them as narrowly as the majority does. In particular, I do not agree that

compensable pre-clearance activity under the Act is limited to "services... that [are] required and necessary to resolve the issues of [an] independent lawsuit." Supra at 507 n. 1.

Participation in pre-clearance reviews may contribute to the advancement of litigation that indisputably gives rise to fee awards. The question is whether, because of its relation to prior litigation, the pre-clearance review in this case is an "action or proceeding" within the meaning of the Act, and whether appellant may be considered the "prevailing party."

The government relies heavily on Gerena-Valentin v. Koch, 739 F.2d 755 (2d Cir. 1984), in urging us to hold that pre-clearance reviews are never actions or proceedings and can therefore never give rise to fee awards. But in Gerena-Valentin the court stated merely that "the

legislative history... contains no suggestion that awards of attorney's fees can be made for work solely in connection with preclearance reviews." Id. at 760 (emphasis added). [1] The court went on to note that "where the initiation of litigation is necessary to compel defendants to obtain preclearance before holding an election, lobbying efforts in a preclearance review might bring the litigation to a quick and successful end, a goal consistent with the statutory purpose..." Id. at 759. The Supreme Court has recently acknowledged that such activity may be compensable if it is "both useful and of a type ordinarily necessary

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[1] See also id. at 760 n.2 (Congress did not contemplate fee awards for work done in administrative proceedings "unrelated to successful litigation") (emphasis added).

to advance the civil rights litigation." Webb v. Dyer County Board of Education, ___U.S.___, 105 S.Ct. 1923, 1929, 85 L.Ed. 2d 233 (1985).

This Court has also recognized the importance of informal, administrative advocacy in advancing the ends of litigation under the Voting Rights Act. In Posada v. Lamb County, Texas, 716 F.2d 1066, 1071 (5th Cir. 1983), we confirmed that "A 'prevailing party' is one whose 'ends are accomplished as the result of the litigation even without formal judicial recognition'" (citing three 5th Circuit cases and one Supreme Court case). [2] In

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[2] Cf. S. Rep. No. 295, 94th Cong., 1st Sess. 41 (1975), reprinted in [1975] U.S. Code Cong. & Ad. News 774, 808 ("for purposes of the award of counsel fees, parties, may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief").

the present case, moreover, the prevailing plaintiffs did have formal judicial recognition of their activities in the pre-clearance review process. As the majority concedes,

> The plaintiffs ... filed an action under section 5 of the Voting Rights Act, 42 U.S.C. §1973c. They sought an injunction to prevent further elections under the 1975 plan and to order the county to develop a new plan .... MALDEF succeeded in enjoining further use of the 1975 plan in October 1979 .... Because of the injunction, Jim Wells County then submitted three plans in succession to the Justice Department for preclearance .... In addition to submitting proposed plans, MALDEF undertook other activities in connection with the preclearance process, primarily lobbying with county and federal officials.... According to MALDEF, the suit for an injunction was not over because the district court retained jurisdiction and had a continuing obligation to secure compliance with the injunction.... [A]s MALDEF points out, the district court retained jurisdiction...to insure compliance with the injunction...

Supra at 507, 508.

In order to recover attorney's fees under the Voting Rights Act the prevailing party must show

"a causal connection between the filing of the suit and the defendant's action." Williams v. Leatherbury, 672 F.2d 549, 551 (5th Cir. 1982) (emphasis added). In Posada we provided the following gloss on the requisite causal connection:

> Causal connection is established by evidence that the plaintiffs' lawsuit was a "substantial factor or a significant catalyst in motivating the defendants to end their unconstitutional behavior" .... The plaintiffs do not have to prove that their efforts were the sole reason for the defendant's rectifying actions. Some award is due so long as the plaintiffs' actions made an important contribution to the improvements achieved.

Posada, 716 F.2d at 1072 (citing three 5th Circuit cases and one Supreme Court case) (emphasis added).

In sharp contradistinction to the authorities cited above, the district court in this case declined to award attorney's fees because "there is no convincing tie-in between Plaintiffs' complaints expressed in

their comments to the Attorney General and his results." Order Awarding Attorneys' Fees, at 4 (emphasis added). As we acknowledged in Posada, plaintiffs must show that their work "had a substantial independent effect on the outcome of the preclearance review" and indeed "changed the result that the Attorney General would otherwise have reached." 716 F.2d at 1075. But there is more than one way to change the Attorney General's mind. The district court, and the majority opinion, fail to consider plaintiffs' effects on the defendants in this case. The plaintiffs may have achieved some of the results they sought through the indirect route of influencing the defendants to submit fairer redistricting plans. Although MALDEF pointed repeatedly to the striking similarity between the plan it advocated from the beginning and the plan eventually

submitted by the county, the district court failed to make findings of fact on this issue.

Thus I would remand this case to the district court for a determination as to whether MALDEF achieved its objectives, at least in part, by persuading the county to submit an appropriate plan for approval. This is, as we noted in Posada, "an intensely factual, pragmatic" inquiry. 716 F.2d at 1072. But there can be little doubt that something of the sort described by MALDEF took place. As the majority concedes, "Because of the injunction, Jim Wells County ... submitted three plans in succession to the Justice Department for preclearance." Supra at 507 (emphasis added). And the district court concludes that "Although Plaintiffs were not successful in all of their endeavors, they were successful in enforcing the rights of

the Mexican-Americans to an undiluted vote..." Order Awarding Attorney's Fees, at 8. [3]

The majority seems to acknowledge that Voting Rights Act plaintiffs can often obtain effective relief only by participating in preclearance submissions, but nevertheless denies that Congress intended for such plaintiffs to be compensated for attorney's fees. I find that puzzling. If Congress intended the end, then Congress must be supposed to have intended the means

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[3] As the Supreme Court has recently admonished in a related context, "a plaintiff who has won substantial relief should not have his attorney's fees reduced simply because the district court did not adopt each contention raised... [T]he court's rejection of or failure to reach certain grounds is not a sufficient reason for reducing a fee. The result is what matters." Hensley v. Eckerhart, 461 U.S. 424, 103 S.Ct. 1933, 1943, 1940, 76 L.Ed. 2d 40 (1983)(emphasis added).

to that end. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407-22, 4 L.Ed. 579 (1819)("It must have been the intention of those who gave these powers, to insure, so far as human prudence could insure, their beneficial execution."). And, in fact, Congress expressed its intentions in these matters quite well:

> [I]n voting rights cases .... Congress depends heavily upon private citizens to enforce the fundamental rights involved. Fee awards are a necessary means of enabling private citizens to vindicate these Federal rights... A party seeking to enforce the rights protected by the Constitutional clause or statute under which fees are authorized by these sections, if successful, "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." Newman v. Piggie Park Enterprises, Inc., 88 S.Ct. 964 [966], 390 U.S. 400, 402, 19 L.Ed. 1263 (1968) .... Courts have been instructed, since the passage of our first civil rights laws, to use the broadest and most effective remedies available to achieve the goals of these laws, and these remedies have included awards of attorneys' fees as costs.

S. Rep. No. 295, 94th Cong., 1st Sess. 40-42 (1975), reprinted in [1975] U.S. Code Cong. & Ad. News 774, 807-09.

Accordingly, I respectfully dissent.[4]

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[4] I do, however, join in the discussion of costs and hourly rates contained in Part V of the court's opinion.

APPENDIX B

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

Civil Action No. C-78-87

ALFREDO R. ARRIOLA, et al.,

Plaintiffs,

VS.

HARVILLE, et al.,

Defendants,

[Filed April 19, 1984]

ORDER AWARDING ATTORNEYS' FEES

By its order of October 9, 1979, the three-judge panel in this case enforced Section 5 of the Voting Rights Act, 42 USC § 1973c, in favor of Plaintiffs against the Commissioners Court of Jim Wells County, Texas, by enjoining elections conducted under a 1975 reapportionment of County

precincts until pre-cleared by the Department of Justice. The Court also ruled that a 1974 re-districting plan was a court-approved plan and should be submitted to the Department of Justice for pre-clearance before use pursuant to Section 5 of the Voting Rights Act. Additionally, the Defendants obtained a ruling that the implementation of the 1975 redistricting plan in previous county elections without preclearance had resulted in violation of the rights of the Plaintiffs and their class, as those rights are set forth by the Voting Rights Act. Although Plaintiffs sought to set aside the 1978 party primary elections for County Commissioners and other County offices using the 1975 county precincts and to schedule new elections with an approved plan, the Court denied that relief. Plaintiffs were awarded attorneys' fees as prevailing parties.

42 USC § 1973l*e*.

Plaintiffs' attorneys from the Mexican-American Legal Defense Fund (MALDEF) seek recovery for a total of 262.1 hours for attorneys, and 519 hours for paralegals, divided as follows:

Attorneys	Hours	Hourly Rate	Amount
Joaquin Avila	182.9	$150.00	$27,435.00
Jose Garza	58.2	75.00	4,365.00
Judith Sanders-Castro	21	75.00	1,575.00
Total Amount for Attorneys			$33,375.00

Paralegals

Erlinda Cortez	184.25	40.00	7,370.00
Diana Ross	335.65	35.00	11,747.75
Total Amount for Paralegals			$19,117.75

Grand Total Claimed for Services $52,492.75

To determine the reasonableness of this claim, the Court will first attempt to determine the number of hours reasonably expended in pursuit of the Plaintiffs' case, then multiply that by a reasonable hourly rate. Hours not reasonably expended should be excluded. The product of reasonable hours times reasonable rate does not end the inquiry. Other considerations may require an up or down adjustment, including the important factor of the results obtained. Hensley v. Eckerhart, 103 S.Ct. 1933 (1983).

I. Number of Hours:

A) Joaquin G. Avila bills 182.9 hours. He was Plaintiffs' lead counsel and carried the burden of organizing Plaintiffs' evidence and presenting it. His work essentially concluded on October 15, 1979, when the three-judge panel issued an order favorable to the Plaintiffs. The Court

finds that all of his hours claimed were reasonably expended in the pursuit of successful litigation. Although no election was set aside, the Plaintiffs' primary goal of enjoining County elections under an unpre-cleared apportionment plan for county precincts. Accordingly, the Court awards all 182.9 hours claimed by Mr. Avila to the Plaintiffs.

B) Jose D. Garza bills 58.2 hours. Mr. Garza's efforts in this case did not begin until after the panel had enjoined any future county elections based on the unapproved 1975 reapportionment plan. His hours are related solely to analysis of the 1975 re-apportionment plan submitted to the Department of Justice, proposed modifications by the county, preparation and submission of proposed MALDEF plans, and discussions with his clients, other MALDEF staff members, and county officials on

plans to be submitted by the county and MALDEF.

Plaintiffs may recover attorneys' fees in voting rights act cases only for successful activities undertaken in a "proceeding," as that word is used in the Act. The Fifth Circuit has expressed serious doubts that pre-clearance activities are "proceedings" within the meaning of the Voting Rights Act. The need to protect private attorneys is less compelling when the private action occurs in the very context of the Attorney General's statutory responsibility. Accordingly, the 5th Circuit has established specific standards of success to be shown by attorneys for their work in pre-clearance activities. First, the Attorney General must have been dissatisfied with the plan submitted. Second, there must be a showing that Plaintiffs'

participation, through particularly astute criticism or creative legal argument, changed the result that the Attorney General would otherwise have reached. Posada v. Lamb County, Texas, 716 F.2d 1066 (5th Cir. 1983).

Plaintiffs have demonstrated the first part of the test, but not the second. It is apparent that Plaintiffs worked hard in pre-clearance phase and communicated their complaints, but there is no convincing tie-in between Plaintiffs' complaints expressed in their comments to the Attorney General and his results. More important, there is no showing that the Attorney General changed the results he would have achieved because of anything the Plaintiffs did. Accordingly, hours for Mr. Garza are disallowed.

C) For Erlinda Cortez, Plaintiffs claim 184.25 hours as a paralegal. The

services of a paralegal can be recovered as attorney's fees, provided the paralegal performs work traditionally done by an attorney; otherwise, those expenses are separately unrecoverable overhead expenses. Jones v. Armstrong Cork Co., 630 F.2d 324 (5th Cir. 1980); Allen v. United States Steel Corp., 665 F.2d 689 (1982). Of those 184.25 hours, 42.5 hours were spent after the panel's decision of October 9, 1979. Her efforts, like Mr. Garza's, dealt with review and submittal of various plans of the county and the Mexican-American Legal Defense Fund. For the same reasons that Mr. Garza's hours are disallowed, her 42.5 hours expended after the date of the order are also disallowed. The balance of her 141 hours were spent in analyzing county and MALDEF proposals to the Department of Justice, making comments to the Department of Justice on the proposed plans, visiting

with clients to discuss re-districting, and conferring with attorneys. Erlinda Cortez did not appear at the hearing, but her affidavit describing her work with dates and hours, and Mr. Avila's testimony, persuade the Court that generally she was properly working as a paralegal. The Court finds these hours were reasonably expended in behalf of the client and awards them to Plaintiffs.

D) For Diana Ross, the Plaintiffs claim 335.65 hours as a paralegal. All of her work commenced after the October 9, 1979, order requiring pre-clearance. Her work is composed solely of work on plans, both of the county and MALDEF, being submitted to the Department of Justice. Even if she were properly a paralegal, for the same reason that the hours of Jose Garza were disallowed, the hours of Diana Ross are disallowed. Plaintiffs have failed in

their proof to establish the facts required under Posada v. Lamb County, Texas, 716 F.2d 1066 (5th Cir. 1983). There is no direct evidence by testimony or affidavit from the Attorney General or sufficiently convincing circumstantial evidence to demonstrate Plaintiffs influenced the plan. The fact that Plaintiffs were working hard at the Texas end is not proof that the Attorney General's Office responded to that by making any changes that it would not have otherwise have made. Accordingly, Diana Ross's hours must be disallowed.

E) Judith Sanders-Castro claims 21 hours for her services in representing MALDEF in this attempt to collect her fees. Her hours are not opposed.

II. Hourly Rate:

A) Joaquin Avila claims $150 an hour. This Court has already established Mr. Avila's rates for work in a Voting Rights

Act case in the same geographic area and for services rendered at the same time in Mr. Avila's professional career. In LULAC v. Williams, 74-C-95 (S.D. Texas--CC Div., 1982) affd. in part No. 83-2064, 5th Cir. 1984, the Court awarded $75 an hour for time spent in Court, $55 an hour for pre-trial preparation, and $20 an hour for travel. Based on the foregoing, Mr. Avila would be awarded for his services:

49.8 hrs (travel) x $20 an hr.	=	$ 996.00
9.5 hrs. (in-court) x $75 an hr.	=	712.50
123.6 hrs. (preparation) x $55	=	6,798.00
Grand Total		$ 8,506.50

Although this hourly rate is consistent with the market value of his services for an attorney of his experience, Plaintiffs' success in this case entitle him to the

hourly rate charged by one of Defendants' attorneys, Kenneth Oden, an attorney of excellent reputation who has practiced in Jim Wells County for many years, which is $70.00 an hour for all hours. This award of a higher fee is justified because of what the Court finds as an efficient prosecution of his client's claim without excessive hours. Accordingly, the Court awards as follows:

49.8 hrs. (travel) x $20 an hr. =	$ 996.00
9.5 hrs. (in-court) x $70 an hr.=	665.00
123.6 hrs. (preparation) x $70 an hr.=	8,652.00
Grand Total	$ 10,313.00

B) Mrs. Sanders-Castro claims $75.00 an hour. The Court also awards her $70.00 an hour, finding that she is in essentially the same market area and experience level at the same time of professional experience as Mr. Avila when he rendered his services

in Arriola v. Harville and LULAC v. Williams. For her services, she is awarded $1,470.00, as opposed to the $1,575.00 that she claims. The Court finds her fee of $1,470.00 is consistent with a recovery of $10,313.00.

To determine whether these fees should be adjusted, the Court has examined the factors in Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717-719 (5th Cir. 1974), and concludes no adjustment is appropriate, because all factors listed in Johnson are not relevant or subsumed in the Court's consideration of the hours awarded and the hourly rates.

The results obtained were good and evidence of professionally rendered services. Although Plaintiffs were not successful in all of their endeavors, they were successful in enforcing the rights of the Mexican-Americans to an undiluted vote,

but this is not the rare case where there is evidence to show that the quality of service rendered was superior to that one reasonably should expect in light of the hourly rates charged or that success was exceptional. No multiplier is added. Blum v. Stenson, No. 81-1374, Mar. 21, 1984, slip op., U.S.S. Ct. Excellence of service was acknowledged by increasing Mr. Avila's hourly rate to equal that of Mr. Oden's, and recognizing an efficiently prosecuted claim.

Erlinda Cortez is awarded $20.00 an hour, not the $40.00 claimed, which the Court finds excessive. Although the Court finds she is competent and of value to the Plaintiffs' attorney, there is no independent evidence of the value of a paralegal in the market. She is paid only $6 to $8 per hour, and there is no explanation of her training as a paralegal.

Accordingly, the Court awards as attorneys' fees the sum of $10,313.00, and as paralegal fees the sum of $2,820.00

ORDERED this the 19 day of April, 1984.

/s/ HAYDEN W. HEAD, JR.
UNITED STATES DISTRICT JUDGE

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

Civil Action No. C-78-87

ALFREDO R. ARRIOLA, et al.,

Plaintiffs,

VS.

HARVILLE, et al.,

Defendants,

[Filed April 19, 1984]

JUDGMENT AWARDING ATTORNEYS' FEES

Based on the findings of the Court, it is ordered that Plaintiffs and their attorneys have judgment against Defendants for $13,133.00.

ORDERED this the 19 day of April, 1984.

/s/ HAYDEN W. HEAD, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 84-2421

ALFREDO R. ARRIOLA, et al.,

Plaintiffs-Appellants,

versus

T. L. HARVILLE, et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Texas

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ON SUGGESTION FOR REHEARING EN BANC

(Opinion January 31, 5 Cir., 1986, ___F.2d___)

(Filed February 27, 1986)

Before GOLDBERG, JOLLY and HIGGINBOTHAM, Circuit Judges.

PER CURIAM:

(X) Treating the suggestion for rehearing en banc as a petition for panel

rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

( ) Treating the suggestion for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. The judges in regular active service of this Court having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ E. Grady Jolly
United States Circuit Judge

APPENDIX D

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

Civil Action No. C-78-87

ALFREDO R. ARRIOLA, et al.,
Plaintiffs,

V.

T. L. HARVILLE, et al.,
Defendants.

[Filed August 3, 1984]

ORDER UNDER RULE 60 (a), FEDERAL RULES
OF CIVIL PROCEDURE CORRECTION
PREVIOUS ORDER AND JUDGMENT

Came on to be heard this 3rd day of August, 1984, Plaintiffs' Motion for Relief from Judgment or Order filed pursuant to Rule 60 (a), Fed. R. Civ. Pro., requesting this Court's correction of clerical mistakes existing in its Order Awarding

Attorneys' Fees and Judgment Awarding Attorneys' Fees, issued April 19, 1984. The Court finds that clerical errors due to oversight or omissions have been made in the order and judgment issued awarding Plaintiffs attorneys' fees. This Court determined in the body of the Order Awarding Attorneys' Fees that fees should be awarded for services rendered by both Plaintiffs' attorneys, Joaquin G. Avila and Judith A. Sanders-Castro, for the amounts of $10,313.00 and $1,470.00, respectively. The final paragraphs, page 8, of the Order only reflect the $10,313.00 awarded for Mr. Avila's services. The $1,470.00 award to Plaintiffs for services of Ms. Sanders-Castro has been inadvertently omitted. In the body of the Order Awarding Attorneys' Fees, a mathematical mistake was made in the calculation of paralegal for which fees were awarded. This Court denied fees for

42.5 of the 184.25 hours claimed for services rendered by Plaintiffs' paralegal, Erlinda Cortez. Due to the oversight, fees were awarded for only 141 paralegal hours at $20.00, inadvertently omitting 0.75 hours. Due to the clerical mistakes, through inadvertent omissions and oversights, contained in the Order allowing hours and setting hourly rates for Plaintiffs' attorneys' fee award, the Judgment Awarding Attorneys' Fees also contains a clerical error in the total sum of fees awarded Plaintiffs in judgment against Defendants.

Therefore, IT SO ORDERED that:

1. Paragragh II (B), page 8, of this Court's Order Awarding Attorneys' Fees, wherein it states:

> Accordingly, the Court awards as attorneys' fees the sum of

> $10,313.00, and as paralegal fees the sum of $2,820.00,

is hereby corrected to read as follows:

> Accordingly, the Court awards as attorneys' fees the sum of $11,783.00, and as paralegal fees the sum of $2,835.00, and

2. The Judgment Awarding Attorneys'

Fees, wherein it states:

> Based on the findings of this Court, it is ordered that Plaintiffs and their attorneys' have judgment against Defendants for $13,133.00,

is hereby corrected to read as follows:

> Based on the findings of this Court, it is ordered that Plaintiffs and their attorneys have judgment against Defendants for $14,618.00.

ORDERED this 3 day of August, 1984.

/s/ Hayden W. Head, Jr.
UNITED STATES DISTRICT JUDGE

APPENDIX E

FOURTEENTH AMENDMENT, U.S. Constitution

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

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FIFTEENTH AMENDMENT, U. S. Constitution

SECTION 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

SECTION 2. The Congress shall have power to enforce this article by appropriate legislation.

42 U.S.C. § 1973c.

> Alteration of voting qualifications and procedures; action by State or political subdivision for declaratory judgment of no denial or abridgement of voting rights; three-judge district court; appeal to Supreme Court

Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the second sentence of section 1973b(b) of this title

are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the third sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prere-

quisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b (f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: Provided, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such

submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise

require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court.

Pub.L. 89-110, Title I, §5, Aug. 6, 1965, 79 Stat. 439, redesignated and amended Pub.L. 91-285, §§ 2, 5, June 22, 1970, 84 Stat. 314, 315, Pub.L. 94-73, Title II, §§ 204, 206, Title IV, § 405, Aug. 6, 1975, 89 Stat. 402, 405.

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42 U.S.C. § 1973l.

Enforcement proceedings
Attorney's fees

(e) In any action or proceeding to enforce the voting guarantees of the fourteenth or fifteenth amendment, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

Pub. L. 89-110, Title I, § 14, Aug. 6, 1965, 79 Stat. 445, redesignated Pub.L. 91-285, § 2, June 22, 1970, 84 Stat. 314, and amended Pub.L. 94-73, Title II, § 207. Title IV, § 402, Aug. 6, 1975, 89 Stat. 402, 404.

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42 U.S.C. § 1988.

Proceedings in vindication of civil rights; attorney's fees

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so

far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

R.S. § 722; Pub.L. 94-559, § 2, Oct. 19, 1976, 90 Stat. 2641; Pub.L. 96-481, Title II, § 205(c), Oct. 21, 1980, 94 Stat. 2330.

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28 C.F.R. § 51.27

Communications concerning voting changes.

Any individual or group may send to the Attorney General information concerning a change affecting voting in a jurisdiction to which Section 5 applies.

(a) Communications may be in the form of a letter stating the name, address, and telephone number of the individual or group, describing the alleged change affecting voting and setting forth evidence regarding whether the change has or does not have a discriminatory purpose or effect, or simply bringing to the attention of the Attorney General the fact that a voting change has occurred.

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28. C.F.R. § 51.39

Standards for determination
by the Attorney General

(d) If the Attorney General determines that a submitted change has the prohibited purpose or effect, an objection shall be interposed to the change.

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